Supreme Court, U. S.
FILED
MAR 31 1977
MICHAEL RODAK, JR., CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

76-1346

LORILLARD, A DIVISION OF
LOEW'S THEATRES, INC.,
Petitioner,

v.

FRANCES P. PONS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Thornton H. Brooks
M. Daniel McGinn
P. O. Drawer U
Greensboro, North Carolina 27402

Attorneys for Petitioner

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	2
Reasons for Granting the Writ	3
1. The decision below conflicts with the decision of the Court of Appeals for the Sixth Circuit as to the proper interpretation of the Seventh Amendment and 29 U. S. C. 626(b) and (c)	3
2. The decision below raises important and recurring problems concerning the proper interpretation of 29 U. S. C. 626(b) and (c) which have not been settled by this Court	4
Conclusion	6

Appendix

A - Judgment, United States Court of Appeals	1a
B - Opinion, United States Court of Appeals	2a
C - Memorandum, United States District Court	7a
D - Morelock v. NCR Corp., Opinion, United States Court of Appeals for the Sixth Circuit	12a

TABLE OF CASES

	Page
Albemarle Paper Co. v. Moody, 442 U. S. 405 (1975)	4
Curtis v. Loether, 415 U. S. 189 (1974)	4
Harkless v. Sweeney Independent School Dist., 427 F. 2d 319 (5th Cir. 1970), cert. denied 400 U. S. 991 (1971)	4
LaRue v. General Tel. Co. of Southwest, 545 F. 2d 546 (5th Cir. 1977)	5
Laugesen v. Anaconda Co., 510 F. 2d 307 (6th Cir. 1975)	6
Lynch v. Pan American World Airways, 415 F. 2d 764 (5th Cir. 1973)	4
Morelock v. NCR Corp., 546 F. 2d 682 (Decided 20 December 1976)	3, 6
Statutes:	
Age Discrimination in Employment Act of 1967 (29 U. S. C. 626):	
Section 626(b)	2, 3, 4, 5
Section 626(c)	2, 3, 4, 5
Section 626(d)	6
Seventh Amendment to the Constitution of the United States	2
Title VII of the Civil Rights Act of 1964	3, 4
Title VIII of the Civil Rights Act of 1968, 42 U. S. C. 3612	4
28 U. S. C. 1254(1)	1
28 U. S. C. 1292(b)	3
42 U. S. C. 1981	4
42 U. S. C. 1983	4
Miscellaneous:	
Developments in the Law - Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109 (1971)	5
Report of Secretary of Labor to Congress, January 30, 1976	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

LORILLARD, A DIVISION OF
LOEW'S THEATRES, INC.,
Petitioner,

v.

FRANCES P. PONS
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Lorillard, petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on 2 February 1977.

OPINIONS BELOW

The opinion of the Court of Appeals decided 2 February 1977 (App., infra, pp. 2a - 7a) is not yet reported. The Memorandum of the District Court entered 21 January 1976, 69 F.R.D. 576, 13 FEP Cases 444, appear in the Appendix (pp.7a-12a).

JURISDICTION

The judgment of the Court of Appeals was entered on 2 February 1977 (Appendix, p. 1a). This petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the Seventh Amendment, or the Age Discrimination in Employment Act (29 U. S. C. 626), requires a jury trial upon demand of one of the parties in an action for injunctive relief and back wages under that Act.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Seventh Amendment to the Constitution of the United States provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

29 U. S. C. 626(b) and (c) provide in pertinent part:

> (b) . . . In any action brought to enforce this (Act) the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this (Act), including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. . . .
>
> (c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: . . .

STATEMENT OF THE CASE

This action under the Age Discrimination in Employment Act was commenced by respondent herein, a former female employee of Lorillard, who alleged in her complaint that when she was 48 years of age, on 31 January 1975, she was terminated by her employer as a part of its policy to discharge older employees and to retain young people as employees wherever possible. Respondent sought injunctive reinstatement, monetary damages consisting of lost wages from date of discharge to date of judgment, together with an equal amount of liquidated damages, costs and attorney's fees.

Respondent demanded trial by jury on all issues of fact. Petitioner's motion to strike respondent's demand for a jury trial was sustained by the District Court, it ruling that actions for lost wages

under Title VII of the Civil Rights Act of 1964, and the Courts of Appeals that have ruled on the subject, have universally denied a jury trial in such actions (App., p. 8a). An interlocutory appeal of the District Court order to the Court of Appeals was allowed. 28 U. S. C. 1292(b); FRAP 5.

The order of the District Court striking petitioner's demand for a jury trial was vacated by the Court of Appeals on the ground that the inclusion of the phrase "legal . . . relief" in 29 U. S. C. 626(b) and (c) empowers a federal court to grant parties in ADEA actions a Constitutional and statutory right to a jury trial. Accordingly, the claim for back pay was remanded for trial by a jury. (App., pp. 6a).

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decision of the Court of Appeals for the Sixth Circuit as to the proper interpretation of the Seventh Amendment and 29 U. S. C. 626(b) and (c)

The Fourth Circuit has here held that the relief sought in an ADEA action constitutes a suit "at common law" as embodied in the Seventh Amendment, and that the Age Act by its terms excludes the non-jury concept and commands the impanelment of a jury, if requested, in claims for lost wages.

In so holding, the Fourth Circuit conceded that its interpretation of the Seventh Amendment and 29 U. S. C. 626(b) and (c) conflicts with that adopted by the Sixth Circuit in *Morelock v. NCR Corp.*, 546 F.2d 682 (decided 20 December 1976). (See App., pp. 12a-19a).

In *Morelock*, the action instituted pursuant to ADEA was tried by a jury, with a verdict being returned in favor of the plaintiff; upon motion by defendant, the district court granted a judgment notwithstanding the verdict and a conditional new trial in favor of defendant. On appeal, the Sixth Circuit read the ADEA to be an offspring of Title VII, noting that the prohibitions of the two Acts are virtually identical in terms. Accordingly, that Court held that the monetary issues to be tried in the case were equitable in nature just as in Title VII actions and were not suitable for trial by jury, and further held that no constitutional right to a jury trial existed in the action.

The Fourth Circuit herein makes no attempt to differentiate the conclusion that it reached from that reached by the Sixth Circuit in *Morelock*.

This direct conflict between the decisions of the Fourth and the Sixth Circuits is of continuing importance and plainly justifies the grant of certiorari to review the judgment below and resolve the conflict.

2. The decision below raises important and recurring problems concerning the proper interpretation of 29 U. S. C. 626(b) and (c) which have not been settled by this Court

The Fourth Circuit's opinion in this case reflects important constitutional, statutory and policy considerations growing out of efforts to demand jury trials in employment discrimination cases. And, particularly since this Court has not had occasion to address itself to this matter since the prohibition of race, color, religious and notional original discrimination embodied in Title VII of the 1964 Civil Rights Act, and the prohibition of age discrimination embodied in the Age Discrimination in Employment Act of 1967, were enacted into law, there are compelling reasons why some definitive guidelines in the application of 29 U. S. C. 626(b) and (c) should now be marked by this Court.

Curtis v. Loether, 415 U. S. 189 (1974), involved a construction of Title VIII of the Civil Rights Act of 1968, 42 U. S. C. 3612, the fair housing provisions of the Act, and the Court stated:

> . . . A comparison of Title VIII with Title VII of the Civil Rights Act of 1964, where the Courts of Appeals have held that jury trial is not required in an action for reinstatement and backpay, is instructive, although we of course express no view on the jury trial issue in that context. In Title VII cases the Courts of Appeals have characterized backpay as an integral part of an equitable remedy, a form of restitution. . . . (415 U. S. at 196-7)

In *Albemarle Paper Co. v. Moody*, 422 U. S. 405 (1975), a Title VII action, it was noted:

> To the extent, then, that the district court retains substantial discretion as to whether or not to award backpay notwithstanding a finding of unlawful discrimination, the nature of the jurisdiction which the court exercises is equittable, and under our cases neither party may demand a jury trial. (422 U. S. at 443) (Rehnquist, J., concurring)

Similarly, a jury trial has been denied in an action for back pay under 42 U. S. C. 1983. *Harkless v. Sweeney Independent School Dist.*, 427 F. 2d 319 (5th Cir. 1970), cert. denied 400 U. S. 991 (1971), and in an action for back pay and punitive damages under 42 U. S. C. 1981. *Lynch v. Pan American World Airways*, 475 F.2d 764 (5th Cir. 1973).

See generally Developments in the Law - Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1266 (1971).

Efforts to demand jury trials in ADEA actions are of common, if not increasing, occurrences and both litigants and lower courts urgently need the assistance of this Court in understanding the policies and the language of the employment anti-discrimination acts, including 29 U. S. C. 626(b) and (c).

This case presents an issue posed by numerous similar discrimination cases throughout the nation which are pending at the trial level. There are seven ADEA actions pending in the Middle District of North Carolina that await a determination of the jury trial issue posed by this Petition.

The Secretary of Labor reported in January 1976 that "since June 12, 1968, the effective date of the Age Discrimination in Employment Act, the Department of Labor has instituted over 255 court actions," including the institution of 30 suits in calendar year 1975.[1]

The total number[2] of employment discrimination actions of all types that were filed in the District Courts during the last four years are:

Fiscal Year of	No.
1973	1,787
1974	2,472
1975	3,931
1976	5,321

If jury trials are entitled to be granted at the request of either party to these actions, a very substantial additional workload will be imposed upon District Courts within the Fourth Circuit.

Furthermore, it is doubtful that an ADEA trial is within the capabilities of a jury — at least experience has proven that such trials often result in judicial time wasted endeavors. For example, see *LaRue v. General Tel. Co. of Southwest*, 545 F. 2d 546 (5th Cir. 1977), where the ADEA action was tried before a jury and after

---

[1] Report of Secretary of Labor to Congress pursuant to Section 13 of the ADEA, January 30, 1976, page 12.

[2] Information furnished by the Director of the Administrative Office of the United States Courts. The actions are not coded as to Acts involved.

plaintiff had presented his evidence and rested, the Court granted defendant's motion for an instructed verdict based upon a finding that plaintiff had failed to give notice to the Secretary of Labor of his intent to file a private suit within 180 days of the alleged unlawful practice as required by 29 U. S. C. 626(d). *Morelock v. NCR Corp., supra,* was tried to a jury, but upon motion by defendant, the District Court granted a judgment notwithstanding the verdict end awarded a conditional new trial in favor of NCR. *Laugesen v. Anaconda* Co., 510 F. 2nd 307 (6th Cir. 1975), involved an action by plaintiff claiming he was unlawfully discharged because of his age in violation of ADEA, and was tried before a jury without objection, but the Court of Appeals reversed and remanded for a new trial because of error in instructions to the jury.

It is, therefore, of widespread public importance that the Court consider the issue here presented so that the lower courts may be guided authoritatively with respect to the constitutional and statutory rights for jury trials in employment discrimination actions.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

Thornton H. Brooks
M. Daniel McGinn
P. O. Drawer U
Greensboro, North Carolina 27402

Attorneys for Petitioner

March 13, 1977

APPENDIX A

JUDGMENT

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 76-1369

Frances P. Pons,

Appellant,

v.

Lorillard, A Division of
Loew's Theatres, Inc.,

Appellee.

Appeal from *the United States District Court for the* MIDDLE District of NORTH CAROLINA.

This cause *came on to be heard on the record from the United District Court for the* MIDDLE *District of* NORTH CAROLINA, *and was argued by counsel.*

On consideration whereof, *It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby,* vacated. The case is remanded to the United States District Court for the district of North Carolina, at Greensboro, for further proceedings consistent with the opinion of the Court filed herewith.

WILLIAM K. SLATE II
Clerk

FILED
Feb. 2, 1977

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 76-1369

Frances P. Pons,

Appellant,

v.

Lorillard, A Division of
Loew's Theatres, Inc.,

Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Eugene A. Gordon, District Judge.

(Argued November 9, 1976 Decided February 2, 1977)

Before Bryan, Senior Circuit Judge, and Butzner and Russell, Circuit Judges.

Norman B. Smith (Smith, Patterson, Follin, Curtis & James on brief) for Appellant; Thornton H. Brooks (M. Daniel McGinn, Brooks, Pierce, McLendon, Humphrey & Leonard on brief) for Appellee.

Albert V. Bryan, Senior Circuit Judge:

Alleging violation of her rights under the Age Discrimination in Employment Act of 1967, 29 U. S. C. 621-634 (1970), appellant Frances P. Pons sued her employer, Lorillard, a Division of Loew's Theatres, Inc.,[1] for injunctive reinstatement, lost wages, liquidated and punitive[2] damages, costs and attorney's fees.[3] Lorillard's motion to strike Pons' demand for a jury trial on the issue of lost wages was sustained by the District Court and an interlocutory appeal of the order was allowed. 28 USC 1292(b); FRAP. 5.

[1] Plaintiff at the age of 48 years was discharged on January 31, 1975; she alleges it was pursuant to a policy of employing younger persons. Lorrillard is a foreign corporation doing business in North Carolina.

[2] On October 18, 1976 Pons moved this court to allow amendment of her complaint to include a prayer for punitive damages.

[3] This appeal involves only the right to a jury trial on the claim of lost wages. The District Judge's opinion notes that the plaintiff "conceded that the liquidated damages issue would not be triable to a jury". Nor are costs, attorney's fees nor, as explained infra, punitive damages before the court. Of course no injunctive relief is now considered.

Our task is to determine whether the Seventh Amendment provision for trial by jury "(i)n suits at common law, where the value in controversy shall exceed twenty dollars" applies to a claim under the Age Act for lost wages.[4] Analysis of the problem begins with the language of the Congress. In relevant part, sections 7(b) and 7(c) of the Act, 29 USC 626(b), (c) state:

> "(b) . . . In any action brought to enforce this (Act) the court shall have jurisdiction to grant such *legal* or equitable *relief* as may be appropriate to effectuate the purposes of this (Act), including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.
>
> "(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such *legal* or equitable *relief* as will effectuate the purposes of this chapter: . . ." (Emphasis added).

Our holding is that the inclusion of the phrase "legal . . . relief" empowers a Federal court to grant complainants the Constitutional right to a jury.

I.

At the outset, we are urged to hold that Age Act complaints should follow the pattern of denial thus far adopted in enforcing the provisions against employment discrimination contained in Title VII of the Civil Rights Act of 1964, 42 UNC 2000e-5. We decline.

Design for decision on this issue is to be found in Curtis v. Loether, 415 US 189 (1974), declaring the availability of a jury in a civil action under Title VIII, section 812(c) of the Civil Rights Act of 1968, 42 USC 3601, 3612 relating to fair housing. This section, as relevant, defines the powers of the court:

> "(c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: . . ."

[4] The question has been discussed and resolved in favor of trial by a jury: Chilton v. National Cash Register Co., 370 FS 660 (SDOhio 1974); Cleverly v. Western Electric Co., 69 FRD 348 (WDMo. 1975); and Murphy v. American Motor Sales Corp., 410 FS 1403 (NDGa. 1976). A list of cases implicitly settling the point is to be found in Murphy v. American Motors Sales Corp., supra, at 1402.

In *Curtis* the Court contrasts Title VII — fair employment — and Title VIII — fair housing — enforcement clauses, concluding that the decisions[5] rejecting a jury trial in Title VII are not construing remedial provisions like those in VIII. 415 US at 196. To repeat, the Court quite cautionsly disavows any interpretation of VII, saying only that its language is not the same as that of VIII. Its distinguishment of the phrasing warrants a lengthy quotation:

> "In Title VII cases the courts of appeals have characterized backpay as an integral part of an equitable remedy, a form of restitution. But the statutory language on which this characterization is based —
>
> > '(T)he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate,' . . . — contrasts sharply with § 812's simple authorization of an action for actual and punitive damages. In Title VII cases, also, the courts have relied on the fact that the decision whether to award backpay is committed to the discretion of the trial judge. There is no comparable discretion here: if a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount." (Citation omitted.)

Id. at 196.

Equivalent differentiation is apparent between the Title VII remedies and those of the Age Act. Comparing the two as they have just now been set forth, it is seen at once that the Age Act includes

---

[5] See Curtis v. Loether, 415 US at 196-97 n. 13, citing Johnson v. Georgia Highway Express, Inc., 417 F2d 1122, 1125 (5 Cir. 1969); Robinson v. Lorillard Corp., 444 F2d 791, 802 (4 Cir.), cert. dismissed under Rule 60, 404 US 1006 (1971); cf. McFerren v. County Board of Education, 455 F2d 199, 202-04 (6 Cir. 1972); Harkless v. Sweeney Independent School District, 427 F2d 319 (5 Cir. 1970), cert. denied, 400 US 991 (1971); Smith v. Hampton Training School, 360 F2d 577, 581 n. 8 (4 Cir. 1966) (en banc); see generally Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1265-66 (1971). To this list of the Court may be added Cox v. Babcock & Wilcox Co., 471 F2d 13 (4 Cir. 1972).

the terminology of a law action, traditionally calling for a jury verdict, rather than only a suit in equity to be decided and decreed by a chancellor. Thus it comprises the power to grant legal relief, that is relief at law — obviously a suit "at common law" embodied in the Seventh Amendment.

II.

The Age Act by its very terms excludes the non-jury concept and commands the impanelment of a jury, if requested, in claims for lost wages. Forthright to prove this view is the incorporation of related provisions of the Fair Labor Standards Act into the enforcement section of the Age Act, 29 USC 626(b), as follows:

> "The provisions of this (Act) shall be enforced in accordance with the powers, remedies, and procedures provided in sections . . . 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) (supra) of this section . . . . Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: . . . "

The Fair Labor Standards Act provision, 29 USC 216 (except subsection (a)), supra, stipulates:

> "(b) Any employer who violates the provisions of section 206 (minimum wages) or section 207 (maximum hours) of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."

Thus the Age Act clearly equates lost wages as "unpaid minimum wages or unpaid overtime compensation" under the FLSA. It is settled that section 216(b) claims are legal in nature and uniformly accorded a jury trial. McClanahan v. Mathers, 440 F2d 320 (6 Cir. 1971); Chilton v. National Cash Register Co., 370 FS at 664 and cases cited.

The ultimate analysis to determine whether a suit is one "at common law" within the Amendment seems to be the three-pronged classical test: (1) Is the issue legal rather than equitable under the custom of the courts of law; (2) Is the remedy legal; and (3) Is the issue triable to a jury given the jurors' practical abilities and limi-

tations? Ross v. Bernhard, 396 US 531, 538 fn. 10 (1970); see 5 Moore's Federal Practice § 38.16 (4) pp. 162.6-8. Where issues of law and equity are intertwined in one suit, those meeting the three-pronged test merit a trial by jury.[6] Dairy Queen, Inc. v. Wood, 369 US 469, 470-73 (1962).

It has been helpfully observed that claims of employment discrimination, coupled with prayers for lost wages, are analogous to the common law action for breach of contract by wrongful discharge or an action in tort, with the Age Act creating the legal duty. *Cleverly v. Western Electric Co.*, 69 FRD at 350-51. To interpret this cause of action as one "incidental" or "integral" to the equitable issue of reinstatement would be to violate the rule of *Dairy Queen, Inc. v. Wood*, 369 US at 470, as just mentioned

As to the second and third phases of the *Ross* test, we believe that a monetary award for back wages is a traditional legal remedy and that the computation of such an award would not be beyond the practical capabilities of a jury. *Cleverly v. Western Electric Co.*, 69 FRD at 351. Consequently, all of the prerequisites to a trial by jury under the Age Act are satisfied.

Hence we hold the jury demand should not have been denied. That order is now vacated and the claim for back pay is remanded for trial by a jury.[7]

Vacated and remanded.

BUTZNER, Circuit Judge, concurring specially:

I agree with the majority opinion that 29 U. S. C. 626(b) entitles a litigant to a jury in an action for the recovery of lost wages resulting from a violation of the Age Discrimination in Employment Act of 1967. Although the Sixth Circuit has reached a contrary conclusion,* I concur in my brothers' ruling that the statute incorporates the provisions for a jury trial required by § 16(b) of the Fair Labor Standards Act, 29 U. S. C. § 216(b).

Since the statute settles the controversy, I find no occasion for embarking on the constitutional quest which my brothers pursue.

---

[6] At once, we recognize that the Seventh Amendment extends its guarantee not only to common law forms of action recognized at its date of enactment — 1791 — but also to actions under modern statutes that create legal rights and remedies. Curtis v. Loether, 415 US at 194; see FRCiv. P. 38(a).

[7] In this court plaintiff for the first time moved to amend her complaint to include a claim for punitive damages. This motion must be remanded for presentation to the trial court. FRCiv. P. 15(a). Likewise items of costs and attorney's fees are matters for decision by that court.

* Morelock v. The NCR Corp., ——— F.2d ———, 45 U.S.L.W. 2316 (6th Cir. Dec. 20, 1976).

See Ashwander v. Tennessee Valley Authority, 279 U. S. 288, 346-48 (1936) (Brandeis, J., concurring) (especially rule 4).

APPENDIX C

Francis P. PONS, Plaintiff,

v.

LORILLARD, a Division of Loew's Theatres, Inc., Defendant.

No. C-75-380-G.

United States District Court,
M. D. North Carolina,
Greensboro Division.
Jan. 21, 1976.

Norman B. Smith, Greensboro, N. C., for plaintiff.

Thornton H. Brooks and M. Daniel McGinn, Greensboro, N. C., for defendant.

MEMORANDUM

GORDON, Chief Judge.

(1) This matter is before the Court on defendant Lorillard's motion to strike the plaintiff's demand for trial by jury. The question for the Court's resolution is whether the Seventh Amendment right to trial by jury extends to an action for injunctive reinstatement, lost wages, liquidated damages, and costs and attorney fees under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1970). The question turns upon whether trial by jury is obtainable on the lost wages issue. Plaintiff makes no argument that the other issues will support trial by jury, and there is no authority to support such an argument.

The question appears to be one of first impression in this circuit.[1] Plaintiff relies upon *Chilton v. National Cash Register Company*, 370 *F.Supp.* 660 (S. D.Ohio 1974), apparently the sole case of precedential value determining the right to jury trial on the issues of Discrimination Act. *Chilton* rejected trial by jury on the issues of liquidated damages, and costs and attorney fees,[2] but upheld the right on the issue of lost wages. Claims of employment discrimination coupled with prayers for lost wages were characterized as not only legal in nature as monetary damages, but also cognizable at

---

[1] Plaintiff points out that this Court has twice before allowed jury trials in age discrimination actions. In those cases, however, no issue was taken with the plaintiffs' demands for jury trial. The cases are of no precedential value here.

[2] The enforcement provision of the Age Discrimination Act, 29 U.S.C. § 626(b), provides that "liquidated damages shall be payable only in cases

law as claims analogous to common law actions for breach of contract by wrongful discharge and, furthermore, well within the practical abilities and limitations of the jurors. 370 F.Supp. at 665. Because it analyzed the operative enforcement section of the Age Discrimination Act, 29 U.S.C. § 626, in light of sections 16 and 17 of the Fair Labor Standards Act, 29 U.S.C. §§ 216, 217 (1970), the court, in finding a right to trial by jury on the lost wages issue, declined to compare age discrimination actions with Title VII cases. *Id.* at 666.

Chilton is by no means dispositive of the question. Actions for lost wages under the Age Discrimination Act are logically analogous to actions for lost wages under Title VII. Like awards of back pay under Title VII, the award of back pay sought by the plaintiff here is "equitable — intended to restore the (recipient) to . . . rightful economic status absent the effects of the unlawful discrimination." *Robinson v. Lorillard Corporation*, 444 F.2d 791, 802 (4th Cir. 1971), *cert. dismissed under rule 60*, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971). The Fourth, Fifth, Sixth, and Ninth Circuits have found an award of back pay under Title VII to be equitable. *Robinson v. Lorillard Corporation, supra; Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125* (5th Cir. 1969); *EEOC v. Detroit Edison*, 515 F.2d 301, 308 (6th Cir. 1975); *Slack v. Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975); *Cf. Smith v. Hampton Training School*, 360 F.2d 577, 581 n. 8 (4th Cir. 1966) (en banc); *Harkless v. Sweeney Independent School District*, 427 F.2d 319, 324 (5th Cir. 1970), *cert. denied*, 400 U.S. 991, 91 S.Ct. 451, 27 L.Ed.2d 439 (1971); *McFerren v. County Board of Education*, 455 F.2d 199, 202-04 (6th Cir. 1972). It is concluded that a comparison of the enforcement provisions of the Age Discrimination Act and Title VII is the proper starting point for analysis of the right to jury trial for lost wages under 29 U.S.C. §§ 621-634.

---

of willful violations of this chapter." The **Chilton** court held an award of liquidated damages to be within the sound discretion of the court, thus not entitling either party to a trial by jury. 370 F.Supp. at 606, **citing McClanahan v. Matthews**, 440 F.2d 320 (6th Cir. 1971), and **Ross v. Bernhard**, 396 U. S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970). In the hearing on the defendant's motion to strike the jury demand, plaintiff candidly conceded that the liquidated damages issue would not be triable to a jury.

Chilton also held that attorney fees and costs "are to be heard only by the Court and to be awarded in this Court's discretion." 370 F.Supp. at 666, **citing Hodgson v. Miller Brewer Co.**, 457 F.2d 221 (7th Cir. 1972).

It is undisputed that trial by jury in a statutory action is required only "if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." *Curtis v. Loether*, 415 U.S. 189, 194, 94 S.Ct. 1005, 1008, 39 L.Ed.2d 260 (1974). In *Curtis* the Supreme Court held that the fair housing provisions of Title VIII of the Civil Rights Act of 1968, which authorizes private plaintiffs to bring civil actions to redress violations of the Act's fair houing provisions, entitled either party to demand a jury trial. But the court "strongly suggested that the employment provisions found in Title VII do not." *Slack v. Havens, supra* at 1094. The distinction between the two statutes lay in a comparison of the "damages" language of section 812 of the Act, 42 U.S.C. § 3612, with the "equitable relief" language of 42 U.S.C. § 2000e-5 (g), and in a comparison of the mandatory nature of the section 812 award with the discretionary nature of the back pay award under Title VII. In clarifying a point of some confusion, the court refused to say that "any award of monetary relief must necessarily be 'legal' relief," *Curtis v. Loether*, 415 U.S. at 196, 94 S.Ct. at 1009, for the purposes of the jury trial requirement. *See Slack v. Havens, supra* at 1094.

(2) In *Chilton v. National Cash Register Company, supra*, the case relied upon by plaintiff, the course seemed to begin its analysis with the observation that an action for monetary damages had to be "legal" in character.[3] While the court there recognized that a suit under section 626(b) of the Age Discrimination Act only for injunctive reinstatement would sound in equity, it concluded that an action under section 626(b) for reinstatement and lost wages would raise both legal and equitable claims. 370 F.Supp. at 664. Under *Dairy*

---

[3] **Chilton** analyzed section 626(b) of the Age Discrimination Act in light of sections 16 and 17 of the Fair Labor Standards Act, but the critical determination there was that a 626(b) claim for lost wages was a legal claim. **Ross v. Bernhard, supra** note 2, at 396 U. S. 531, 538, 90 S.Ct. 733 n. 10 held that the "legal" nature of an issue is determined by considering whether (1) the issue is legal rather than equitable under pre-merger custom, (2) the remedy sought is legal, not equitable, and (3) the issue is triable to a jury given its practical abilities and limitations. **The Chilton** court found the first test satisfied because claims of employment discrimination and prayers for lost wages were analogous to common law actions for breach of contract, and, according to pre-merger custom, would have been cognizable at law. The second test was satisfied by the plaintiff's claim for money damages, traditionally a legal remedy. The court found the third test easily satisfied. 370 F.Supp. at 665. Indeed, proof may be difficult, but the mere fact that it is does not take an action from the province of the jury. **See Dairy Queen v. Wood**, 369 U.S. 469, 478-79, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962).

Queen v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed. 2d 44 (1962), the legal claim, for lost wages, would have to be tried to a jury. The Supreme Court's decision in *Curtis* lends impetus towards a different result. Because a claim for monetary damages is not always legal, there is not necessarily a mixed claim at law and equity in an action for injunctive reinstatement and lost wages. What confronts the Court here is not a mixed claim, but a single cause of action which must be characterized as either legal or equitable. If the claim for lost wages is an integral part of an equitable remedy of reinstatement, then it makes no difference that monetary damages are involved.

In her attempt to persuade the Court that the issue of lost wages is triable to a jury, the plaintiff argues that the remedial provisions of the Age Discrimination Act and Title VII are critically distinct, as were the remedial provisions of Title VIII and Title VII in *Curtis v. Loether*. Section 626(b) of the Age Discrimination Act states that

> "(t)he provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section . . . " 29 U.S.C. § 626(b) (1970).

The remedial provisions of Title VII state that

> "the court may enjoin the respondent from engaging in such lawful employment practice, and order other such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . ; or any other equitable relief as the court deems appropriate . . . " 42 U.S.C. § 2000e-5(g) (1970 ed., Supp. II).

Plaintiff argues that it is apparent that Title VII remedies, including back pay, are denominated forms of "equitable relief," while section 626(b) empowers courts "to grant such legal or equitable relief as may be appropriate." The result of this argument is that actions for

back pay under Title VII are "equitable" while under the Age Discrimination Act they are "legal."

The right to trial by jury should not be dependent upon a slight degree of difference in statutory terms. In *Curtis* the Supreme Court compared the two statutes (Title VIII and Title VII) and found a "sharp contrast" in their remedial provisions. Section 812 clearly authorized actions to enforce "legal rights" within the Supreme Court's Seventh Amendment decisions because the relief available under the section — actual and punitive damages — was the traditional form of relief offered in the courts of law. 415 U.S. at 195-96, 94 S.Ct. 1005. Section 2000e-5(g) had been characterized as equitable by the courts of appeals and differed in several respects. There was no comparable discretion; if a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount. Nor was there any sense in which the award under section 812 could be viewed as requiring the defendant to disgorge funds wrongfully withheld from the plaintiff, 415 U.S. at 197, 94 S.Ct. 1005. Applying a similar analysis of the statutes here, it is apparent that there is no drastic difference like that evident in *Curtis*. The remedial provisions of section 626(b) and section 2000e-5(g) are similar, and their similarity is due to the fact that the statutes are designed to remedy correspondent evils. "With a few minor exceptions the prohibitions of (the Age Discrimination in Employment Act of 1967) are in terms identical to those of Title VII of the Civil Rights Act of 1964 except that 'age' has been substituted for 'race, color, religion, sex, or national origin.' " *Hodgson v. First Fed. Savings and Loan Ass'n of Broward County, Florida*, 455 F.2d 818, 820 (5th Cir. 1972).

Here the Court has chosen to compare age discrimination actions with Title VII cases. *In Chilton*, as noted, the district court took the opposite approach and drew on sections 216 and 217 of the Fair Labor Standards Act, incorporated in the enforcement provisions of the Age Discrimination Act, for guidance. While either approach may be fundamentally sound, the Court is persuaded that only a single cause of action is presented here, rather than the mixed claims of law and equity recognized in *Chilton*. An award of back pay is not viewed as "incidental" to injunctive relief, but as an integral part of that relief. Although plaintiff's action is founded upon the Age Discrimination Act rather than Title VII, her claim for lost wages is no less an integral part of the equitable remedy of reinstatement. "To consider it apart from that context would be to distort the traditional line dividing legal from equitable remedies."[4]

[4] While the Ninth Circuit Court of Appeals made this statement in a Title VII case in which the plaintiffs sought a jury trial by reason of a claim for lost wages, the Court believes that the statement should apply with equal force to age discrimination cases.

Slack v. Havens, supra at 1094.

Accordingly, counsel for the defendant will present a proposed order striking plaintiff's demand for trial by jury.

APPENDIX D

MORELOCK v. NCR CORP.
U. S. Court of Appeals,
Sixth Circuit (Cincinnati)

MORELOCK, et. al. v. THE NCR CORPORATION, Nos. 75-2220 and 75-2282, December 20, 1976.

Full Text of Opinion

THOMAS D. LAMBROS, District Judge:—This is an appeal from an action instituted pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq. (1970). Essentially, the complaint charged that the NCR Corporation (NCR) did not maintain a bona fide seniority system[1] at its Dayton, Ohio facilities.

(PROCEEDINGS BELOW)

On the ground that this was an equitable action, NCR moved to strike the Appellants' jury demand. The District Court overruled this motion and the case was tried to a jury, with a verdict being returned in favor of the Appellants on April 1, 1975. Upon motion by NCR the District Court granted a judgment notwithstanding the verdict and a conditional new trial in favor of NCR.

Appellants appeal from the order of the District Court granting judgment notwithstanding the verdict. NCR cross-appeals as to the propriety of a jury trial in actions brought under the ADEA. For the reasons stated below we find that the District Court erred in overruling NCR's motion to strike the Appellant's jury demand. As this case was properly triable in its entirety in the District Court without a jury, we remand this case for findings of fact and conclusions of law in accordance with Rule 52(a), Fed. R. Civ. P.

In 1938 actions at law and suits in equity were merged into a single "civil action".[2] While this merger abolished the procedural distinction between these actions, the substantive distinctions have been retained for purposes of determining issues triable by jury. *Kennedy v. Lakso*, 414 F.2d 1249, 1251 (3rd Cir. 1969). The basic

*The Honorable Thomas D. Lambros, Judge, United States District Court for the Northern District of Ohio, sitting by designation.

[1] 29 U.S.C. § 623(f) (1970) procides in pertinent part:

> It shall not be unlawful for an employer, employment agency, or labor organization—(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan . . . which is not a subterfuge to evade the purpose of this chapter . . .

[2] Rule 2, Fed. R. Civ. P.

principle remains that a civil action in the nature of an action at law is triable to a jury, while one in the nature of a suit in equity is properly tried to the court. See *Kennedy v. Lakso, supra*, at 1251.

(SEVENTH AMENDMENT)

As a result of the 1938 merger, the federal courts must often determine the right to a jury trial in actions which present mixed questions of law and equity within the context of a single case. This right, guaranteed by the Seventh Amendment "(i)n suits at common law, where the value in controversy shall exceed twenty dollars", has been preserved[3] and extended to apply to actions enforcing contemporary statutory rights, so long as the statute creates legal rights and remedies enforceable in an action for damages in the ordinary courts of law. See e.g. *Curtis v. Loether*, 415 U.S. 189, 194 (1974). However, the mere fact that a monetary award is an incident of the relief requested does not mandate that an action be characterized as legal rather than equitable. See e.g., *Curtis v. Loether, supra* at 196; *Slack v. Havens*, 522 F.2d 1091, 1094, (9th Cir. 1975). In certain actions monetary relief is an integral part of an equitable action to which the Seventh Amendment is inapplicable. See e.g. *Slack v. Havens, supra* at 1094; *Wirtz v. Jones*, 340 F.2d 901, 904, 5th Cir. 1965). The propriety of jury trials in cases presenting such mixed questions of law and equity is determined by the nature of the issue to be tried. *Ross v. Bernhard*, 396 U.S. 531, 538 (1970).

Appellants allege violations of § 623 of the ADEA. This section provides in pertinent part:

> § 623. (a) It shall be unlawful for an employer —
>
> (1) to fail to refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

[3] Rule 38, Fed. R. Civ. P.

The applicable enforcement provisions of the ADEA invoked by the Appellants are set forth in § 626:

§ 626. (b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act, prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title; PROVIDED, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation, judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference and persuasion.

(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter; PROVIDED, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.

Pursuant to these provisions Appellants sought relief from the trial courts in the form of reinstatement with back pay and benefits, a preliminary and permanent injunction enjoining NCR from discriminating against any and all of the Appellants because of their age, and compensatory, punitive and liquidated damages.[4] In order to determine the nature of the issue to be tried in this case ,and therefore the propriety of a jury trial, it is necessary to evaluate the ADEA, and particularly § 626, in view of the relief requested by the Appellants.

(ADEA AND TITLE VII)

First Federal Sav. & L. Ass'n of Broward Co., Fla., 455 F.2d 818, 820,

The ADEA is an offspring of the Civil Rights Act of 1964.[5] Enacted in 1967, the express purpose of the Act is to promote the "employment of older persons based on their ability rather than age" and to prohibit "arbitrary age discrimination".[6] The prohibitions of the ADEA are in terms virtually identical to those of Title VII of the Civil Rights Act of 1964,[7] except that "age" has been substituted for "race, color, religion, sex or national origin." *Hodgson v.*

(5th Cir. 1972). The similarities between Title VII and the ADEA are "hardly accidental", and although it may be inappropriate to simply borrow and apply the standards of Title VII to the ADEA automatically, an analogous application of such standards should not be disregarded. See *Laugesen v. Anaconda Co.*, 510 F.2d 307, 311, (6th Cir. 1975). An analysis of the ADEA, therefore, necessarily requires some discussion of Title VII.

The enforcement provisions of Title VII are set forth in 42 USC § 2000e-5. This section provides *inter alia* for a two-tier system of enforcement by which aggrieved individuals initially seek redress through the Equal Employment Opportunities Commission, with the right reserved to proceed in private civil litigation should such individual be dissatisfied with the Commission's efforts. These enforcement provisions are modeled after those of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(c) (1970), which has as its objective the vindication of the public interest by making employees whole for losses suffered through unfair labor practices. See *Mims v. Wilson*, 514 F.2d 106, 110, (5th Cir. 1975). The provisions of § 2000e-5 have been modified from those of the NLRA in order to permit private civil actions to redress violations of Title VII. However, the basic thrust of Title VII, like the NLRA, is remedial in nature and is directed at the consequences of unfair employment practices. See *Palmer v. General Mills, Inc.*, 513 F2d. 1040, (6th Cir. 1975).

(FUNCTION OF COURT)

The function of the Court in dealing with violations of Title VII is provided in 42, U.S.C. § 2000e-5 (g):

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

---

[4] Two of the five Appellants have never been laid off, demoted or otherwise had their position, or the work performed thereunder, altered.

[5] See, H.R. Rep. No. 805, 1967 U. S. Code Cong. and Adm. News p2213 ct. seq. Also see S. Rep. No. 872, 1964 U. S. Code Cong. and Adm. News p. 2355, 2408.

[6] 29 U.S.C. § 621(b) (1970).

[7] 42 U.S.C. § 2000e-1 et. seq. (1970).

Private actions pursuant to this section have been held to be equitable in nature and therefore not triable by jury.[8] See e.g. *McFerren v. County Board of Ed. of Fayette Co., Tenn.*, 455 F.2d 199, (6th Cir. 1972); *King v. Laborers Internat. U. of No. America, Local 818*, 443 F.2d 273, (6th Cir. 1971). The monetary relief available under this section in the form of back pay is an integral part of the equitable remedy of reinstatement, and is a form of restitution, not damages. See e.g. *E.E.O.C. v. Detroit Edison Co.*, 515 F.2d 301, (6th Cir. 1975).

Although the prohibitory provisions of Title VII and the ADEA are in terms identical, the enforcement sections of these acts differ. The enforcement provisions of § 626 of the ADEA essentially follow those of the Fair Labor Standards Act (FLSA).[9] These enforcement provisions replaced those in the original congressional bill, which had provided for enforcement provisions similar to those of the NLRA.[10] The effect of this modification is to allow individuals, as well as the Secretary of Labor, to seek remedies through court action.[11] The applicable provisions of the FLSA are found in 29 U.S.C. §§ 216, 217, (1970) which provide in pertinent part:

§ 216. (b) Any employer who violates the provisions of section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated . . . The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under Section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation.

§ 217. The district courts . . . shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a) (2) of this title the restraining of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter . . .

(ACTIONS BY SECRETARY)

Addressing § 217 initially, actions by the Secretary of Labor pursuant to this section have been held to be equitable in nature and exclusively within the province of the court, e.g. *Paradise Valley Investigation and Patrol Services, Inc. v. Dunlop*, 521 F.2d 1342, (9th Cir. 1976); *Geyer Broadcasting Co. v. Holder*, 14 Fed. Rules Serv.

2d. 621, (7th Cir. 1970); *Sullivan v. Wirtz*, 359 F2d. 426, (5th Cir. 1966). The purpose of § 217 is to correct a continuing offense against the public interest by assuring effective and uniform compliance with and adherence to the public policy relating to wage standards set forth in the FLSA. See e.g. *Wirtz v. Atlas Roofing Mfg. Co.*, 377 F.2d 112 (5th Cir. 1967); *Wirtz v. Jones, supra; Wirtz v. Ocala Gas Co.*, 336 F.2d 236, (5th Cir. 1964). The enforcement of a monetary award as an incident to injunctive relief in actions under § 217 is simply a part of the reasonable and effective means of bringing about compliance with the FLSA, *Wirtz v. Jones, supra.*

Pursuant to § 216(b) individuals are permitted to proceed in private civil actions to redress violations of the FLSA. Such actions have been characterized as actions at law, and on proper demand, triable before a jury. See e.g. *Wirtz v. Jones, supra.* However, the provisions of § 216(b) must be considered in conjunction with those of 29 U.S.C. § 626(c) in order to ascertain the nature of the issues presented in individual actions under the ADEA.[12] Section 626(c) provides that "(a)ny person aggrieved may bring a civil action . . . for such legal or equitable relief as will effectuate the purposes of this chapter."

The terms of this section serve to expand the individual's power to proceed in private civil actions beyond that afforded him by § 216(b) of the FLSA. In actions pursuant to § 216(b) individuals are limited to seeking legal remedies and are precluded from obtaining injunctive relief. See *Powell v. Washington Post Co.*, 267

---

[8] In discussing actions pursuant to 42 U.S.C. § 2000e-5(g), the United states Supreme Court in **Curtis v. Loether, supra** at 267, observed, in dicta, that the language of this section, authorizes an equitable action for reinstatement and back pay, as opposed to an action for damages, which is inappropriate for trial by jury. The Supreme Court further noted that this language committed the decision to award back pay to the discretion of the trial judge, and that such an award in fact constitutes funds wrongfully withheld from the plaintiff. See also **Slack v. Havens, supra.**

[9] 29 U.S.C. § 201 et. seq. (1970). The enforcement provisions of the ADEA also include subsection (c) of 29 U.S.C. § 626.

[10] 29 U.S.C. § 160 et. seq.

[11] See H.R. Rep. No. 805, 1967 U.S. Code Cong. and Adm. News p. 2213, 2218. The legislative history of Title VII and the ADEA demonstrates that although the express enforcement provisions of these acts differ, the provisions of each act originated in the NLRA and were respectively modified in order to permit individuals to seek relief through civil litigation. It has been observed that the primary burden of enforcing equal employment statutes is on the private plaintiff. **Romasanta v. United Airlines, Inc.**, 537 F.2d 915, (7th Cir. 1976).

F.2d 651 (D.C. Cir. 1959); *Roberg v. Henry Phipps Estate*, 156 F.2d 958 (2d Cir. 1946); *Bowe v. Judson C. Burns, Inc.*, 137 F.2d 37)3rd Cir. 1943). Section 626(c) gives individuals the right to seek equitable as well as legal relief. Effectively, § 626(c) of the ADEA supplements the provisions of § 216(b) of the FLSA as to permit individuals to seek the same remedies for violations of the ADEA as are available to the Secretary of Labor.[13]

(DISCRETION OF COURT)

In "any action" involving violation of the ADEA the provisions of 29 U.S.C. § 626(b) empower the Court to "grant such legal or equitable relief as . . . appropriate to effectuate the purposes of this chapter, including without limitation . . . employment, reinstatement or promotion , . . . or amounts deemed . . . unpaid minimum wages or unpaid overtime compensation".[14] The scope of power and the degree of discretion vested in the Court by these provisions parallel that provided the Court in actions pursuant to 29 U.S.C. § 217 and 42 U.S.C. § 2000e-5. Such discretion and power have been important factors in the characterization of an action as being equitable in nature.[15] Appellants' action in this case[16] is basically for reinstatement and injunctive relief. Such an action necessarily invokes the broad powers of the Court and is essentially equitable in nature. The monetary relief sought by the Appellants is the equivalent of funds allegedly wrongfully withheld from them by NCR in the past, and is an integral part of the basic equitable claim for reinstatement. Accordingly, the issues to be tried in this case are equitable in nature, directly analogous to the equitable issues pursued in actions under 29 U.S.C. § 217 and 42 U.S.C. § 2000e-5, and not suitable for trial by jury.[17]

As no constitutional right to a jury trial existed in this action, the jury impaneled by the District Court was, in effect, an advisory one. *Hyde Properties v. McCoy*, 507 F.2d 301 (6th Cir. 1974).[18] When an advisory jury is used, the ultimate responsibility for findings of fact and conclusions of law remains with the district court. See *Hyde Properties v. McCoy, supra; Frostie Co. v. Dr. Pepper Co.*, 361 F.2d 124 (5th Cir. 1966); *Mallory v. Citizens Utility Co.*, 342 F.2d 796 (2d Cir. 1965). Where the district court fails to provide findings of fact and conclusions of law, the proper procedure is to vacate the judgment and remand the case for such findings, *Armstrong v. Collier*, 536 F.2d 27, 72 (5th Cir. 1976).[19] Accordingly, we remand this case to the District Court for findings of fact and conclusions of law in accordance with Rule 52, Fed. R. Civ. P.[20]

---

[12] Statutes should not be construed in such a fashion as to render certain provisions superfluous or insignificant. **Ziegler Coal Co. v. Kleppe**, 536 F.2d 398 (D.C. Cir. 1976).

[13] See 29 U.S.C. § 217.

[14] The language of 29 U.S.C. § 626(b) "such legal or equitable relief as will effectuate the purposes of this chapter" is repeated in 29 U.S.C. § 626(c) regarding the remedies available to individuals in actions brought under this section.

[15] See N. 7,**supra.**

[16] The ADEA is not to be applied formalistically, but on a case by case basis. See **Laugesen v. Anaconda Co., supra** at 312 n. 4, 10 FEP Cases at 571.

[17] The right to trial by jury in which an individual seeks purely legal damages under the ADEA is not before the Court in this case. It has been held that in such a situation the individual is entitled to a jury trial, **Chilton v. NCR Co.**, 370 F.Supp. 660, (S.D. Ohio 1974). We note, however, that the Chilton case did not consider either the ADEA's close similarity with Title VII or the import of 29 U.S.C. § 626(c). See **Laugesen v. Anaconda Co., supra** at 312 n. 2.

[18] After the decision in the **Hyde Properties v. McCoy** case had been circulated and approved by the three judges constituting the panel, the court was notified through the Clerk that the parties were engaged in efforts to settle their differences. At that time, however, the Clerk had not received a formal notification of settlement from the parties. In the absence of such notification the opinion of the Court was forwarded to the printer for publication. Subsequent to that time, but before the release of the printed opinion, the Court received formal notification of settlement from the parties. Accordingly, the **Hyde Properties v. McCoy** does not have full precedential effect before this Court. However, we find it persuasive in the instant case.

[19] It is well settled that Rule 52(a), Fed. R. Civ. P., is not a jurisdictional requirement for appeal, and that where there is a sufficient basis for the appellate court to consider the merits of the case remand is not required. See **King v. Commissioner of Internal Revenue**, 458 F.2d 245, 249 (6th Cir. 1972); **Armstrong v. Collier, supra** at 77. However, remand is particularly appropriate in the case at bar. This case involves a very complex seniority system which was the result of many years of collective bargaining experience. In evaluating cases presenting such seniority systems the courts must look beyond what may be facially neutral policies and view such systems in light of their effect in operation, not in the abstract, *cf.* **Laugesen v. Anaconda Co., supra.** See **EEOC v. Detroit Edison Co.**, 515 F.2d 301, (6th Cir. 1975); **Jersey Central Power & Light Co. v. Local Unions of Intern. Broth. of Elec. Workers**, 508 F.2d 687, (3rd Cir. 1975). Findings of fact and conclusions of law are appropriate in such cases not only to assist the trial court in the adjudicatory process, but also to assist the appellate court in reviewing such complex evaluations.

[20] In view of the disposition of this case we find it unnecessary to address the remaining issues presented by this appeal.